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No. 95-487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995.

PROPAC-MASS, INC.,
Petitioner,

v.

LINDA RUTHARDT, COMMISSIONER OF INSURANCE OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

1. Whether Propac's second petition for a writ of certiorari was timely filed under 28 U.S.C § 2101(c) (1988).

2. Whether the Due Process Clause permits an executive official of a State to revoke the license of an insurance company for hazardous conduct by relying on findings made by a trial court against the same licensee, in the absence of a second hearing by the official.

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RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, respondent Linda Ruthardt, Commissioner of Insurance of Massachusetts, submits this brief in opposition to the petition for a writ of certiorari. ("Pet.").

Opinions Below

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 420 Mass. 45, 648 N.E.2d 407 (1995), and appears at pp. 1a - 7a of the appendix to the petition ("Pet. App."). The decision and orders of the Supreme Judicial Court for Suffolk County - the trial session of the Commonwealth's highest court - are not reported but appear at Pet. App. 8a - 9a. The decision of the respondent is not reported but appears at Pet. App. 10a - 15a.

The related decision and judgment of the Massachusetts Superior Court are not reported but appear at Pet. App. 16a - 32a. The Supreme Judicial Court affirmed that judgment in an opinion issued on the same day as the opinion in the case under review here. The opinion of the Supreme Judicial Court in the related case appears at 420 Mass. 39, 648 N.E.2d 435 (1995).

Jurisdiction

The opinion and judgment of the Supreme Judicial Court were entered on April 11, 1995. On July 11, 1995, Propac filed a petition for a writ of certiorari. On July 31, 1995, the Clerk of this Court rejected the petition on the ground that it had been filed one day late. Pet. at 2. See Supreme Court Rules 13.1 and 13.3.

On August 7, 1995, Propac filed in the Supreme Judicial Court a "Motion for Leave to Enlarge Time to File Petition for Rehearing" and a "Petition for Rehearing." Respondent opposed the motion. According to Propac's motion, "counsel's . . . miscalculation by one day prohibit[ed] the United States Supreme Court from docketing the petition and PROPAC's sole avenue of relief lies with th[e] [Supreme Judicial] Court."

Mot. to Enlarge Time at 2. Propac further argued that "even if the [Supreme Judicial] Court grants this motion [to enlarge time] and thereafter denies PROPAC's petition, that denial would give PROPAC ninety days within which to resubmit its petition to the United States Supreme Court for a writ of certiorari." Mot. to Enlarge Time at 6.

On August 29, 1995, the Supreme Judicial Court denied Propac's motion to enlarge time. Pet. App. 36a. On September 7, 1995, the Supreme Judicial Court issued a second order which stated: "The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied." Pet. App. 35a.

On September 21, 1995, Propac filed its second petition in this Court.

On September 25, 1995, Propac filed a "Motion for Clarification" in the Supreme Judicial Court, seeking an "amendment" to the "docket" to "reflect the granting" of Propac's motion to enlarge time. See Pet. at 2. This motion states that Propac "seeks clarification because the determination of which entry is correct controls the issue whether the time period for the filing of a petition for writ of certiorari to [the] United States Supreme Court has expired." Mot. for Clarification at 2. The Supreme Judicial Court has not acted on Propac's motion for clarification.

Propac invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a) (1988). In Argument I, below, respondent contends that the Court lacks jurisdiction because the second petition is untimely.

Constitutional Provision and Statutes Involved

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

Mass. G.L. c. 175, § 5 (West 1987 ed.), appears at Pet. App. 33a-34a.

Mass. Gen. Laws c. 30A, § 13 (West 1992 ed.), provides:

> "License", as used in this section, includes any license, permit, certificate, registration, charter, authority or similar form of permission required by law.
>
> Except as otherwise provided in this section, no agency shall revoke or refuse to renew any license unless it has first offered the licensee an opportunity for hearing in conformity with sections ten, eleven and twelve. If a licensee has, in accordance with any law and with agency regulation, made timely and sufficient application for a renewal, his license shall not expire until his application has been finally determined by the agency. Any agency that has authority to suspend a license without first holding a hearing shall promptly upon exercising such authority afford the licensee an opportunity for hearing in conformity with sections ten, eleven and twelve.
>
> This section shall not apply -

(1) Where a provision of the General Laws expressly provides that an agency is not required to grant a hearing in regard to revocation, suspension or refusal to renew a license, as the case may be; or

(2) Where the agency is required by any law to revoke, suspend or refuse to renew a license , as the case may be, without exercising any discretion in the matter, on the basis or a court conviction or judgment; or

(3) Where the revocation, suspension or refusal to renew is based solely upon failure of the license to file timely reports, schedules, or applications, or to pay lawfully prescribed fees, or to maintain insurance coverage as required by any law or by regulation; or

(4) Where there is a refusal to renew the license of a foreign insurance company by said commissioner under authority of section five of chapter one hundred seventy-five, if such refusal or revocation is upon the grounds that such company is insolvent or is in an unsound financial condition, or that its condition or management is such as to render its further transaction of business hazardous to the public or its policyholders, or that the amount of its funds, net cash or contingent assets is deficient or that its capital stock or deposit or guaranty capital or guaranty fund is impaired, as set forth in section twenty-three A of said chapter one hundred and seventy-five, or that such capital

> stock, deposit or guaranty capital or guaranty fund has been reduced below the amount required by section one hundred and fifty-one of said chapter one hundred and seventy-five.

Mass. Gen. Laws c. 175, § 94F (West 1987 ed.), provides as follows:

> The commissioner shall examine the application and declaration and all documents filed in connection therewith; and, if he is satisfied that they comply with the law and the allegations of fact contained therein are true, he shall issue to the attorney in fact a license to transact business, authorizing him to execute for the subscribers under the name designated, such contracts or reciprocal or inter-insurance as are authorized by this chapter, which license shall be subject to section five; provided, however, that no license for a reciprocal insurance exchange consisting of subscribers who are commercial fishing boat owners shall be issued until the applicant has submitted to the commissioner the standards of risk management to be used in evaluating admissions and policy renewals, and until such standards have been certified by the commissioner as being reasonably calculated to provide a risk low enough to permit the reciprocal insurance exchange to remain solvent.

Mass. R. App. P. 27(a) provides as follows:

> A petition for rehearing should be filed with the clerk of the appellate court within fourteen days after the date of the rescript unless the time

is shortened or enlarged by order. It shall state with particularity the points of law or fact which it is contended the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted, except by order of the quorum or panel which decided the appeal. No answer to a petition for rehearing will be received unless requested by the quorum or panel, but a petition for rehearing will ordinarily not be granted in the absence of such a request. A petition for rehearing shall be decided by the quorum or panel which decided the appeal. If a petition for rehearing is granted, the quorum or panel may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case. Action upon a petition is in the discretion of such quorum or panel, which may award costs, including a reasonable attorney's fee, to the prevailing party.

Statement of the Case

An accurate statement of the case appears in the opinion of the Supreme Judicial Court. Pet. App. 1a-4a.

Reasons for Denying the Writ

Under Supreme Court Rule 10.1, "[a] review on writ of certiorari is not a matter of right but of judicial discretion[,]" and "will be granted only when there are special and important reasons therefor." The purpose of certiorari jurisdiction is to permit the Court to select cases of "such gravity and general importance" as to warrant plenary review. *In re Woods*, 143 U.S. 202, 206 (1982). For the reasons stated below, the petition (1) is untimely, and (2) does not satisfy the traditional criteria which guide the Court's discretionary review. Accordingly, the petition should be denied.

I. THE PETITION IS UNTIMELY BECAUSE NO TIMELY PETITION FOR REHEARING WAS FILED IN THE COURT BELOW.

Propac's second petition for a writ of certiorari in this Court is untimely because no timely petition for rehearing was filed in the court below. Under Supreme Court Rule 13.1, a petition is timely "when it is filed with the Clerk of this Court within 90 days of the entry of the judgment." Propac concedes that judgment was issued by the court below on April 11, 1995 (Pet. at 1); that Propac filed its first petition in this Court one day late (*id.* at 1-2); and that the Clerk of this Court "refused to receive" the petition. *See* Supreme Court Rule 13.3.

Propac's second petition is also untimely. It was filed on September 25, 1995, well beyond ninety days after entry of the judgment below. Propac argues, however, that the second petition is timely because it was filed within ninety days of the disposition of its belated petition for rehearing in the Supreme Judicial Court. This argument invokes Supreme Court Rule

13.4, which provides in relevant part:

> [I]f a petition for rehearing *is timely filed in the lower court* by any party in the case, the time for filing the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment.

Id. (emphasis added).

This rule does not support the timeliness of Propac's second petition because no petition for rehearing was timely filed in the lower court. Under Massachusetts law, a petition for rehearing is timely if "filed with the clerk of the appellate court within fourteen days after the date of the rescript unless the time is shortened or enlarged by order." Mass. R. App. P. 27(a). Propac filed its Motion to Enlarge Time and Petition for Rehearing on August 7, 1995. Respondent opposed the motion. On August 29, 1995, the Supreme Judicial Court denied Propac's motion for leave to enlarge the time to file its petition for rehearing. Pet. App. 36a. On September 7, 1995, the Supreme Judicial Court denied the petition for rehearing. *Id.* at 35a.

These orders do not show that a petition for rehearing was timely filed in the lower court. In fact, the first order expressly *denied* the motion by which Propac sought to *make* timely a petition that was more than two months late. The second order of the Supreme Judicial Court denied the petition for rehearing, but there is no reason in the circumstances to believe the second order was, as Propac states, after "consideration of the merits" of the petition. Pet. at 2. Rather, it is more likely that the second order simply

implemented the first: the petition for rehearing was addressed and denied in light of the denial of the motion to enlarge time. In any event, there never was pending a "timely" petition for rehearing that tolled the ninety-day period for a petition in this Court.[1]

This result is consistent with the cases of the Court. The time for a petition for a writ of certiorari is not tolled where "a motion for leave to file . . . a petition [for rehearing] out of time . . . [is] denied . . ." *Bowman* v. *Loperena*, 311 U.S. 262, 266 (1940). The time for a petition is only tolled "where the court [below] *allows the filing* and, after considering the merits, denies the petition[.]" *Id.* (emphasis added). *See Morse* v. *United States*, 270 U.S. 151, 153-154 (1928)(where leave to file motion for new trial out of time not granted, period for appeal to Supreme Court not suspended); *cf. Pfister* v. *Finance Corp.*, 317 U.S. 144, 148-151 (1942)(under Bankruptcy Act, where court below did not "reexamine the basis" of original orders, time for filing petition for review not

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[1] Propac's petition for rehearing could also have been denied by the Supreme Judicial Court for a jurisdictional reason apart from untimeliness: the fact that the court's rescript had issued on May 9, 1995, and had been entered on the docket of the lower court - the Supreme Judicial Court for Suffolk County - on May 10, 1995. *See* Mass. R. App. P. 23 (rescript issues to lower court twenty-eight days after date of rescript, unless stayed by timely filing of petition for rehearing); *Joyce* v. *George W. Prescott Publishing Co.*, 352 Mass. 767, 225 N.E.2d 355, 356 (1967)("After the case went to judgment in the Superior Court, the case is no longer subject to the jurisdiction of [the Supreme Judicial Court].").

extended). *See generally* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, pp. 284-287 (7th ed. 1993).

Propac admits that it filed its tardy petition for rehearing only after its first petition for certiorari was rejected by this Court as untimely. Pet. 1-2. Indeed, Propac's motion to enlarge time below stated that the allowance of the motion and the denial of the petition for rehearing "would give Propac ninety days within which to re-submit its petitions to the United States Supreme Court. . . ." Mot. to Enlarge Time at 6. The timing and content of Propac's motion thus show that it was designed solely as "an attempt to rejuvenate an extinguished right to appeal." *United States* v. *Healy*, 376 U.S. 75, 77 (1964)(timely filing of petition for rehearing in criminal case tolls time for appeal to Supreme Court). However, "[w]hen the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter." *Credit Company, Limited* v. *Arkansas Central Railway Co.*, 128 U.S. 258, 261 (1888). If a judgment may be revived in the fashion attempted here, there would be no such thing as "the final word of a final court." *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U.S. 548, 551 (1945). For all of these reasons, Propac's second petition in this Court is untimely. The petition should accordingly be denied.

II. THE PETITION FAILS TO CLAIM A CONFLICT IN THE COURTS BELOW OR PRESENT AN ISSUE OF NATIONAL IMPORTANCE THAT MERITS REVIEW BY THIS COURT.

Propac does not claim that the Supreme Judicial Court "has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Supreme Court Rule 10.1(b). Nor does Propac claim that the due process issue raised by the petition is unsettled, recurring, or of broad impact. In fact, the alleged error in the decision below has little or no importance beyond the unique facts of this case and the parties involved. In the absence of a claim of conflict or a national issue, the Court should deny the petition in this case.

III. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT UNDER THE DUE PROCESS CLAUSE.

The sole ground for the petition appears to be that the decision below "conflicts with applicable decisions of this Court." Pet. at 14. To the contrary, the decision below is consistent with the decisions of this Court under the Due Process Clause.

The court below correctly noted that Propac "had already had a judicial hearing in the Superior Court concerning the circumstances on which the commissioner based her revocation decision." Pet. App. 6a (citation omitted). The court held that "[o]n principles of collateral estoppel, Propac was bound by the findings of fact in the Superior Court case even if the Superior

Court judgment was on appeal." *Id.* The court below further held that "[c]ertainly due process principles did not entitle Propac to two hearings." *Id.* (citations omitted). The court concluded that the "commissioner properly relied on the findings and rulings that the trial judge had made, and that [the Supreme Judicial Court] upheld. . . ." *Id.*

The decision below is consistent with decisions of this Court. An executive official may revoke the license of a person on the basis of findings of fact entered against the same person in a previous trial. In such cases, the Due Process Clause does not require a second hearing because the material facts are decided by the first. Where "the government makes a decision based upon *facts* which have already been determined through some adequate procedural system *such as a trial*[,] . . . the individual will have no further right to a hearing if the disputed issues have already been resolved by adequate process." R. Rotunda & J. Nowak, *Treatise on Constitutional Law*, § 17.8 at 645-646 (2d ed. 1992)(emphasis added). "Thus the Court has held that there is no right to a hearing or other procedure in connection with a suspension or revocation of a person's automobile driver's license where the revocation is based on violations of traffic laws which were previously established through the judicial process." *Id.* (footnote omitted)(citing *Dixon* v. *Love*, 431 U.S. 105, 112-114 (1977)). *See Almeida* v. *Lucey*, 372 F. Supp. 109, 112 (D. Mass. 1974)(three-judge court), *aff'd*, 419 U.S. 806 (1974); *cf. Parratt* v. *Taylor*, 451 U.S. 527, 543-544 (1981)(Due Process Clause does not require predeprivation administrative hearing where State provides adequate judicial means to compensate for loss).

Here, Propac received a full opportunity in the Massachusetts Superior Court to contest the facts material to the revocation of its license.[2] The Superior Court found that the Board of Advisors of the Massachusetts Employers Insurance Exchange (MEIE) had authority, under the governing documents and statutes, to give the notice of termination of Propac as attorney-in-fact on December 4, 1992. Pet. App. 26a-28a. The Superior Court further found that

> Propac . . . did not accept its notice of termination. Rather than cooperating with the Exchange to insure an orderly and peaceful transition, it challenged the Exchange's authority to terminate it as attorney-in-fact. Propac removed files to another location without notice to the Exchange. Propac informed the Exchange on November 15, 1993, that it was vacating the Exchange's principal office. Propac informed AIM [Associated Industries of Massachusetts] subscribers that their workers' compensation insurance would be jeopardized if they signed a new power of attorney appointing a different attorney-in-fact. Propac instructed AIM subscribers to pay premiums to it instead of the Exchange. Propac conducted a campaign to solicit AIM subscribers for its account. Propac, in sum, challenged AIM in the

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[2] Nothing in the record shows that Propac even requested a hearing before the Commissioner. The lack of such a request undermines a claim that the Due Process Clause required a second hearing. *See Sullivan* v. *Carignan*, 733 F.2d 8, 9 (1st Cir. 1984).

marketplace and in the courtroom.

Pet. App. 21a.

The court found that "Propac on notice of termination refused and refuses to cooperate with the Exchange in an orderly transition to a new attorney-in-fact. Rather, Propac engages in a campaign to retain office in breach of a covenant, fairly read, that permits the Exchange, without cause, to terminate it." Pet. App. 28a-29a. The court ruled that "Propac is in violation of its covenant, implied in the agreement of good faith and fair dealing" and further ruled that "Propac's conduct constitutes unfair acts or practices in violation of [Mass. G.L. c.] c. 93A." Pet. App. 29a; *see Mass. Employers Insurance Exchange* v. *Propac-Mass., Inc.*, 420 Mass. at 40-42, 648 N.E.2d at 437-438.

The Commissioner revoked Propac's license on the basis of these findings of the Superior Court. Pet. App. 2a-3a, 10a-15a. The Commissioner ruled that "Propac has engaged, and has indicated its intent to engage, in conduct which renders its further transaction of business hazardous to the public and the subscribers of [the Exchange]." Pet. App. 4a.

Despite the findings of the Superior Court, Propac argues that it was entitled to a second hearing before the Commissioner because the "Superior Court never addressed the issue facing the Commissioner regarding the continued licensure of [Propac]." Pet. at 15. Propac thus argues that since revocation of its license was not an issue in the Superior Court, the Commissioner violated principles of due process in relying on the findings of that court.

These arguments miss the point of the cases of this Court. An agency need not hold a second hearing when the earlier

hearing has decided the material *facts*. In such cases, the first hearing need not have decided the same question of *law* as the second hearing. *See Dixon* v. *Love*, 431 U.S. at 112-114. Thus, in this case, it was enough that at trial Propac had the opportunity to address the questions of fact that were material to the license revocation. These factual findings were relevant to the license revocation because they established a reasonable basis for the Commissioner's judgment that the "further transaction of business" by Propac "would be hazardous to public." Mass. G.L. c. 175, § 5. There was no need for a second hearing to establish the same facts.

The following example illustrates the point. A doctor is convicted of murdering a patient. The state Board of Registration in Medicine revokes his license without a hearing, citing the need for prompt action and its view that the material facts were decided by the criminal court. The doctor objects and argues that the murder trial had "nothing to do with his license" and that this fact was "tacitly acknowledged" by representatives of the Board who attended the trail for murder. The doctor's argument would be beside the point. Of course the murder trial would not have decided whether the doctor should remain licensed. But the trial would have established facts relevant to revocation, and the Board could rely on such findings without holding its own hearing. For the same reasons, the Court below correctly rejected Propac's due process claim. Litigation is not a lottery, and Propac had no constitutional right to relitigate the findings of the Superior Court before the Commissioner.

Finally, the findings of the Superior Court also obviated the need for the court below to reach the question whether, in the absence of a prior hearing, the Due Process Clause requires a

hearing before the Commissioner prior to the revocation of the license of an attorney-in-fact for conduct "hazardous to the public" under Mass. G.L. c. 175, § 5. *See* Pet. App. 6a. Since the court below did not reach that question, this Court should not grant the petition to consider it. *See Capital Cities Cable Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984)(Court does "not ordinarily consider questions not specifically passed upon by the lower court").

Conclusion

For the reasons stated above, the petition for a writ of certiorari should be denied.

LINDA RUTHARDT,
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